No. ~~1227~~ 80

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

FEDERAL POWER COMMISSION, *Petitioner,*

v.

STANDARD OIL COMPANY OF TEXAS, A DIVISION OF CHEVRON OIL COMPANY, ET AL., *Respondent.*

BRIEF OF RESPONDENT STANDARD OIL COMPANY OF TEXAS IN OPPOSITION

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OPINIONS BELOW

The opinions and orders below, with the exception of the Commission's order issued on February 5, 1963 (29 F.P.C. 218), are set forth at Appendices A and B of the Federal Power Commission's petition herein and at Appendix C of the Commission's petition in No. 1133, October Term, 1966 (hereinafter called the *Sunray* Petition). The Commission's order of February 5, 1963, is printed as Appendix A to this brief (App. A, *infra*, pp. 1a-9a).

QUESTION PRESENTED

The Commission issued to respondent Standard Oil Company of Texas (hereinafter called "Sotex") temporary certificates authorizing sales of natural gas at prices conforming to the level of rates prescribed in the Commission's Statement of General Policy No. 61-1 (24 F.P.C. 818). These temporary certificates contained no condition or requirement respecting the making of refunds of prices collected for sales thereunder. No judicial review of these certificates was sought. Thereafter, in a contested proceeding, the Commission issued an order holding that no amounts collected under the temporary certificates would be required to be refunded. No judicial review of this order was sought. Three years later the Commission ordered Sotex to refund approximately 2 cents per Mcf of the 18 cent price collected under the temporary certificates. The question presented is whether, under the circumstances affecting these certificates, the Commission's refund order is valid.

STATEMENT

The Commission, after approximately two months deliberation in each case, issued two conditional temporary certificates to Sotex. In both cases the proposed initial price was required to conform to the 18 cent per Mcf price level then specified in the Commission's Statement of General Policy No. 61-1 (24 F.P.C. 818).[1] Since the 18 cents per Mcf to be collected under both temporary certificates was in accordance with the Com-

[1] In one case Sotex's proposed initial price of 19.795 cents was reduced to 18 cents. In the other case the proposed initial price was 18 cents per Mcf, but the Commission declared inoperative a contractual price escalation clause.

mission's published official guideline, the certificates did not contain any contingent refund conditions. No judicial review of these certificates was sought.[2] Sotex accepted the temporary certificates thus conditioned and, in reliance thereon, commenced deliveries.

The United Gas Improvement Company, Philadelphia Electric Company and Long Island Lighting Company, all of whom are petitioners in the companion cases before this Court, Nos. 1134 and 1135, had actual notice of the issuance of the temporary certificates. In November, 1962, they moved the Commission to revoke the certificates or to impose upon them a contingent refund condition. The Commission, on February 5, 1963, denied the motion, holding that the 18 cent price specified in the temporary certificates was firm until permanent certification and that such price was not subject to retroactive refund liability.[3] The intervenors did not seek judicial review of this order.

Thereafter, on March 23, 1964, the Commission issued permanent certificates conditioned to 16 cents per Mcf (31 F.P.C. 623). Sotex reduced its price to the prescribed 16 cents and does not, in this case or in the companion cases before this Court, challenge this inline price.

In July of 1966, the Commission finally issued further orders (the subject of this case), ostensibly denominated as "conditions" to the permanent certificates issued two years earlier, requiring Sotex to re-

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[2] Temporary certificate orders are final orders which must be reviewed within the time provided by Section 19(b) of the Natural Gas Act. *Texaco, Inc.* v. *Federal Power Commission*, 290 F. 2d 149 (CA 5, 1961).

[3] The order of the Commission is printed as Appendix A to this brief.

fund with interest nearly 2 cents of the 18 cent price which the Commission had authorized in accordance with its Policy Statement and which it had held, by its final order of February 5, 1963, not to be subject to any refund obligation.

REASONS FOR DENYING THE WRIT

In its petitions in this case and in the companion *Sunray* case (No. 1133) the Commission seeks to present to this Court the broad hypothetical question as to whether under any circumstances it has "power" to order refunds with respect to sales of natural gas made under temporary certificates which do not contain conditions requiring the making of such refunds. It asserts that this question is important because it is presented in numerous pending cases involving large sums of money. It further contends that the decision of the court below is in conflict with the *Skelly* decision of the Court of Appeals for the District of Columbia Circuit,[4] and with the decision of this Court in *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223.

Contrary to the Commission's contention, the issue in this case is narrow in scope. Putting aside facts peculiar to any individual sales, the circumstances surrounding the issuance of temporary certificates by the Commission can be grouped into three broad classes:

(1) Temporary certificates issued before promulgation of guideline prices;

(2) Temporary certificates issued after the promulgation of, and therefore affected by, guideline prices; and

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[4] *Public Service Commission of New York* v. *Federal Power Commission*, 329 F. 2d 242, certiorari denied *sub nom. Prado Oil & Gas Co.* v. *Federal Power Commission*, 377 U.S. 963.

(3) Temporary certificates issued at or below a guideline price and held by final order of the Commission after adversary proceeding to authorize a firm price not subject to refund.

The temporary certificates in this case fall in the third category. So far as we can determine, other than the sales involved in this case, only six sales out of the hundreds for which the Commission has issued temporary certificates are in this category. In these circumstances the reasons advanced by the Commission in support of the writ are not persuasive.

(a) *Alleged conflict with Skelly.* The temporary certificates issued in *Skelly* were issued before the Commission had embarked on its program of holding the line of initial prices by prescribing the guideline prices contained in its Policy Statement No. 61-1, and before its broad scale institution of initial in-line price certificate proceedings. The *Skelly* temporaries were not, as in this case, conditioned upon the reduction of the proposed initial prices to the level of the guideline price, and had not, as in this case, been the subject of reconsideration in a contested proceeding which resulted in a final order holding that the prices were firm and not subject to refund. Further, *Skelly* recognized that the Commission should not order refunds, even as to temporary certificates issued before the promulgation of the guideline prices, contrary to the equities in a particular case. As the opinions of the court below so strongly point out, the equities in this case which were considered by the court compel the setting aside of the Commission's refund orders.

(b) *Alleged conflict with Callery.* In *Callery* this Court held that the Commission could order refunds of sums collected pursuant to certificates "which never

became final" (382 U.S. 223, 229). Lack of finality occasioned by the institution of timely review proceedings was the crux of the decision. In the present case, each of the temporary certificates and the rates collected thereunder were affected by two final orders. Both the orders issuing the temporary certificates and the later order declaring that refunds would not be required (Appendix A) were appealable. Neither was challenged, and each became final.

(c) *Importance.* We have noted that the case at bar and a few similar sales involved in one other case [5] present unique facts. These few sales must properly be distinguished from the large number of sales the Commission cites in an effort to demonstrate the importance of this case.

Beyond this, even the hypothetical question posed by the Commission has long since lost its importance. An examination of the Commission's workpapers relating to its claim that there are some 479 existing temporary certificates "in which the identical issue may arise" (Petition No. 1133, p. 8) reveals that the vast majority of those temporary certificates prescribe prices which are either at or below the current in-line price which the Commission, in completed proceedings, has already prescribed for the areas in question (and hence would not result in refunds), or are temporary certificates prescribing guideline prices in the very few areas in which the Commission has not yet prescribed in-line prices. In addition, the Commission's workpapers indicate that since the middle of 1964, the Com-

[5] See Order of February 5, 1963 in Area Rate Proceeding, Docket No. AR61-2, 29 F.P.C. 223. Of the 24 sales affected by that Order, all but six have been finally disposed of by settlement or otherwise.

mission has followed the policy of inserting express refund conditions in temporary certificates authorizing interim sales at prices higher than those prescribed in previously determined in-line certificate proceedings.

And finally, the Commission, by its Order No. 336, issued on February 9, 1967 (Appendix B, *infra,* pp. 10a-12a), has ordered that henceforth all temporary certificates shall contain express refund conditions fixed at a level 2 cents below the previously determined in-line or guideline price (whichever is lower) for the area involved.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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